UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CM ENERGY, GP AND ITS SUBSIDIARIES CM ENERGY HOLDINGS, LP, CM ENERGY FACILITIES, LP AND CM OPERATIONS, LP, SUCCESSORS TO JUSTICE HIGHWALL MINING, INC.	
and	**Case 06-CA-202855**
INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, DISTRICT 17, AFL-CIO, CLC,	
and	
THOMAS McCOMAS, an Individual	**Case 06-CA-200465**
and	**Case 06-CA-198911**
NICHOLAS CODY DOVE, an Individual	

REPLY OF RESPONDENTS CM ENERGY, GP AND ITS SUBSIDIARIES CM ENERGY HOLDINGS, LP, CM ENERGY FACILITIES, LP AND CM ENERGY OPERATIONS, LP TO COUNSEL FOR THE GENERAL COUNSEL'S AND INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, DISTRICT 17, AFL-CIO CLC'S OPPOSITION TO MOTION TO DISMISS THE CONSOLIDATED COMPLAINT

Respondents CM Energy, GP, CM Energy Holdings, LP, CM Energy Facilities, LP and CM Operations, LP reply pursuant to Board Rule 102.24(c) to Counsel for the General Counsel's and International Union, United Mine Workers of America, District 17, AFL-CIO CLC's opposition to their motion to dismiss the Consolidated Complaint in the above-referenced cases.

I. Cases 06-CA-200465 (McComas Charge) and 06-CA-198911 (Dove Charge)

As Respondents' motion establishes (pp. 2-4), the original charges in Case 06-CA-200465 (filed by Charging Party Thomas McComas ("McComas")) and 06-CA-198911 (filed by Charging Party Nicholas Cody Dove ("Dove")) were not served on them until *over two (2) years* after Section 10(b)'s six (6) month requirement to maintain a Complaint under the Act. *See* 29 U.S.C. § 160(b).

This fatal fact is undisputed. Tellingly, nowhere does Counsel for the General Counsel's Opposition ("GC Opposition") reference Section 10(b)'s explicit service requirement. Counsel for the General Counsel cannot even bring themselves to do so when acknowledging yet parsing the "literal language" of Section 10(b) -- otherwise known as the enactment of Congress which the Board is obligated to enforce. *See* GC Opposition, p. 2.

Counsel for the General Counsel's alleged "Applicable Legal Standard" (GC Opposition, pp. 2-3) is notable for its lack of citation to Board case authority, including addressing the *Dun & Bradstreet* decision cited at p. 3 of Respondents' Motion. This is unsurprising, because as *Dun & Bradstreet* and subsequent decisions make clear, Board policy is to mandate -- consistent with Section 10(b)'s "literal language" -- that a charge actually be served within the six (6) month limitations period. Such a bright line approach is sensible, fair, and effectuates the statutory text.[1]

Thus:

> Since the addition of the 10(b) proviso language by Congress in the 1947 Taft-Hartley amendments, the Board has consistently held that, *absent the existence of a properly served charge, a respondent will not be liable for conduct occurring more than 6 months earlier*. *Old Colony Box Co.*, 81 NLRB 1025, 1027 (1949); *Erving Paper Mills*, 82 NLRB 434, 435 (1949); *Cathey Lumber Co.*, 86 NLRB 157, 162-163 (1949), enfd. 185 F.2d 1021 (5th Cir. 1951), vacated on other grounds 189 F.2d 428 (5th Cir. 1951); *Luzerne Hide & Tallow Co.*, 89 NLRB 989, 1004

[1] No legally cognizable special circumstances why the charge could not have been timely served have been shown -- much less pleaded -- in this case.

> (1950); *Koppers Co.,* 163 NLRB 517 (1967); and *Ducane Heating Corp.,* 273 NLRB 1389, 1391 (1985). See also *West v. Conrail,* 481 U.S. 35, 36-38 (1987). As the Board explicitly stated in *Koppers,* 'In each case, the 6-month period is determined by the date of the service of the charge. Thus, a day 6 months earlier becomes the cutoff date and activities occurring before such date may not be alleged as unfair labor practices.' 163 NLRB at 517.

Dun & Bradstreet Software Servs., 317 NLRB 84, 85 (1995) (emphasis supplied). *See also Readyjet, Inc.,* 365 NLRB No. 120 (2017), slip op. 2 ("Under Section 10(b) of the Act, a charge must both be filed and served within 6 months of the alleged unfair labor practice."); *Postmates, Inc.*, General Counsel Advice Memorandum, Case No. 29-CA-204616 (February 12, 2018), p. 2 ("Failure to serve a charge within the six-month time limitation period results in dismissal of the charge as time-barred.") (footnote omitted).[2]

The authority referenced by on pp. 2-3 of the GC Opposition does nothing to overcome governing Board law addressing Section 10(b)'s timely service requirement. *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959) does not address such an obligation. Apart from not constituting binding authority, neither does *Reebie Storage and Moving Co., Inc.*, 44 F.3d 605 (7th Cir. 1995). Rather, both cases touch upon whether complaint allegations which differ from those in a charge may be asserted under a relatedness doctrine. A timely filed and served charge as per Section 10(b) is presupposed.

In *Hospital & Service Employees Union v. NLRB*, 708 F.2d 1245 (9th Cir. 1986), a Court of Appeals decision which likewise does not govern the Board, it was significant to the Ninth Circuit that the employer was served with and answered a complaint within six months of the alleged violations. *Id.* at 1248-1249. The Court considered a complaint served within the Section

[2] Counsel for the General Counsel's citation (GC Opposition, p. 2) to the Board's regulation at 29 C.F.R. § 101.4 does not help them. Instead, it underscores that "timely service of a copy of the charge" is a requirement.

10(b) period was to cure the lack of timely charge service. As the Ninth Circuit noted, "the complaint is particularly designed to give notice of the substance of the charges. …This point is illustrated by the pleadings in this case. The charges here state in conclusionary terms that the Employer had refused to renegotiate its collective bargaining agreement with the Union. By contrast, the complaint set out in detail the alleged violations of sections 8(a)(5) and (1) of the Act." *Id.* at 1249 and n. 4.

Counsel for the General Counsel's novel departure from the express statutory text and the Board's unambiguous approach to Section 10(b) -- absent narrow equitable tolling considerations not present here -- should be rejected. Moreover, unlike in *Hospital & Service Employees Union*, the Complaint in this case was not remotely served within Section 10(b)'s six (6) month limitations period. Counsel for the General Counsel further acknowledges that the "Respondent" was not even named "as the correct employing entity" in any charge until outside of the Section 10(b) period. *See* GC Opposition, pp. 3-4. Indeed, even further, Dove's and McComas' original charges allege that they were unlawfully laid off by an employer unrelated to Respondents. On their face, they make no allegation regarding a refusal to hire by Respondents. *See* Motion, p. 3 and Exhibits 1-2. [3]

Counsel for the General Counsel then unpersuasively tries to save the Complaint by claiming a continuing violation.[4] *See* GC Opposition, pp. 3-4. As they admit, however, their

[3] Counsel for the General Counsel's "policy" arguments (GC Opposition, pp. 4-6) are contrary to the Board's bright line timely service standard described above. Further, although consistent with that mandate Respondents are not required to show prejudice, the various charges are a morass of changing parties and legal theories.

[4] Otherwise, it is well established that to be valid, among other conditions, an amended charge must relate back to an original charge that satisfies Section 10(b)'s filing and service requirements -- which did not occur here. *See, e.g., Villa Maria Nursing and Rehabilitation Center, Inc.*, 335 NLRB 1345, 1351 (2001).

theory of the instant cases is that the Respondents assumed a portion of the coal operation at Coal Mountain, West Virginia on January 27, 2017, and "[t]hereafter, the Complaint alleges that the Respondent[s] failed and refused to hire [Dove and McComas] because of their activities on behalf of [the Union] and in an effort to avoid a successor bargaining obligation with the Union." *Id.*, p. 3.

The Respondents emphatically deny that they violated the Act. For purposes of their motion to dismiss, even if its allegations were true, the Complaint cannot sustain a continuing violation theory. If *arguendo* the Respondents refused to hire Dove and McComas at the end of January 2017 to avoid a successor bargaining obligation with the Union, the Complaint asserts that the same motivation propelled any subsequent refusal to hire them. Any further attempts to be hired would have been futile.[5] Accordingly, there is nothing different about the General Counsel's case emanating from any more recent charge that did not exist within the original Section 10(b) period after the Charging Parties definitively were not hired. *See also* Motion, pp. 3-4.

Counsel for the General Counsel does not even attempt to distinguish *Postal Serv. Marina Mail Processing Ctr.*, 271 NLRB 397, 400 (1984). *See* Motion, p. 3. *Postal Serv.* is explicit that where -- as here -- a definitive employment decision is undertaken, a charge "must" be filed and served within six (6) months of that date. The period for bringing a valid charge under the Act cannot be artificially extended in derogation of Section 10(b)'s textual requirements by claiming a "continuing" violation in the face of a conclusive action.

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[5] The GC Opposition contends (p. 4) that the Respondents "continued hiring mechanics at Coal Mountain in February and July 2017." The Complaint itself specifies no such allegations. *See* Motion, Exhibit 1. In any event, a February 2017 refusal to hire Dove and McComas due to the same supposed anti-union motivation also would not have been within the Section 10(b) period of their October 5, 2017 First Amended Charges. Further, as they filed their original, untimely served discriminatory refusal-to-hire charges in May and June 2017 respectively (GC Opposition, p. 3), any later refusal to hire in July 2017 *arguendo* would have been futile.

Along those lines, Counsel for the General Counsel's reliance on *La-Z-Boy Tennessee*, 233 NLRB 1255 (1977) (GC Opposition, p. 4), is unpersuasive. In that case, when the discriminatee re-applied for employment, his application was reconsidered; and, in fact, "Respondent was encouraging [the discriminatee] in his application for reemployment in an attempt to gather information concerning the Union[,]" made "promises of employment" which ultimately went unfulfilled, and itself treated the discriminatee's employment application as continuing. *Id.* at 1257-1258. Under such circumstances, the employer's refusal to hire was not definitive.

No such allegations exist here. Nor does anything in the Complaint purport to claim that: (1) Dove and McComas reapplied for employment after they were not hired, or that Respondents had a practice of retaining and considering rejected applications for new job opportunities; (2) their employment was given meaningful reconsideration when further openings for which they were qualified occurred; and (3) they were denied a position due to different union animus than supposedly already caused Respondents' refusal to hire them. *See* Motion, Exhibit 1. Rather, if -- as alleged -- the unlawful motivation for refusing to hire Dove and McComas was to avoid a successor bargaining obligation, their rejection outside the Section 10(b) period necessarily was conclusive.

II. Case 06-CA-202855 (Union Charge)

Case 06-CA-202855, brought by Charging Party International Union, United Mine Workers of America, District 17 AFL-CIO CLC ("Union") similarly should be dismissed because it is untimely under Section 10(b).

In their Oppositions, Counsel for the General Counsel and the Union ignore the substance of Respondents' showing at pp. 4-6 of their Motion to Dismiss. The only charge filed by the Union within the Section 10(b) period following the Coal Mountain transition on or about January 27,

2017, *i.e.*, the July 21, 2017 charge, varies from the Complaint in several fundamental, incurable ways: (1) it names a different respondent employer; (2) it asserts a different bargaining unit at issue (a former unit of Dynamic Energy, Inc. instead of Justice Highwall); (3) it alleges a different successor bargaining relationship (successor to Dynamic Energy, Inc. instead of Justice Highwall); and (4) nowhere are Dove and McComas referenced. *Id.* Along those lines, the Union's bare contention (Union Opposition, p. 2) that the July 21, 2017 charge "raised factual and legal allegations that were carried forward in each of the amended charges" is just flat out wrong as shown by the charges themselves. *See* Motion Exhibits.

Counsel for the General Counsel and the Union view the essential disconnect between the July 21, 2017 charge and the Complaint to be within the purview of the Board's "closely related" doctrine. *See* GC Opposition, pp. 4-6; Union Opposition, pp. 2-3.[6]

Even if the Board's "closely related" doctrine were to apply to a situation like here where there is a difference between the respondent named in the charge and in the complaint, there is no sufficiently close relationship as a matter of law:

- there is no allegation or reference in the Complaint with respect to Cornerstone Labor Services, Inc. or Dynamic Energy, Inc.
- there is no allegation in the Complaint that Respondents have any relationship to Cornerstone Labor Services, Inc. or Dynamic Energy, Inc.
- there is no allegation in the Complaint as to any alleged relationship between Dynamic Energy, Inc. and Justice Highwall

[6] In *Redd-I, Inc.*, 290 NLRB 1115 (1988), for example, the Board set forth factors it would consider in determining whether otherwise untimely allegations are closely related to timely filed and served allegations so that the former are not time barred under Section 10(b). The Board has looked to: (1) whether the untimely allegations involve the same legal theory as the timely allegation; (2) whether the allegations arise from the same factual circumstances; and (3) whether a respondent would raise similar defenses to the timely and untimely allegations.

Accordingly, the bundle of legal theory, factual circumstances, and defenses would be distinct, *e.g.*, with respect to employment relationships, corporate relationships, the existence of successorship, and alleged respondent liability. *See WGE Federal Credit Union*, 346 NLRB 982, 983 (2006) (finding lack of "closely related[ness]" where, among other things, the alleged untimely conduct factually involved a different perpetrator than the alleged timely conduct, and therefore different legal defenses).

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Counsel for the General Counsel's "ripeness" argument (GC Opposition, p. 6) joined by the Union is groundless because Respondents' Motion to Dismiss is based upon the faces of the charges and the Complaint. The Complaint is defective as a matter of law, and no further evidence is needed to grant Respondents' motion. Accordingly, the administrative hearing scheduled to begin on February 24, 2020 would be wasteful and unnecessary. At a minimum, the February 24 hearing should be held in abeyance until a reasonable time after the Board has considered and ruled upon the Motion to Dismiss.

CONCLUSION

For the reasons described above and in Respondents' Motion to Dismiss, the Complaint should be dismissed in its entirety.

Respectfully submitted,

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February 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of February 2020, I caused this document to be filed with the Executive Secretary of the Board in Washington, DC through the Board's electronic filing system. The undersigned attorney also certifies that I caused a true and correct copy of the foregoing to be served on the Regional Director of Region 6 via email to nancy.wilson@nlrb.gov, on the Union via email to Charles F. Donnelly at cdonnelly@umwa.org, and Deborah Stern at dstern@umwa.org, and on Charging Parties McComas and Dove via email to their counsel of record, Samuel Petsonk at sam@petsonk.com.

/s/ Bryan M. O'Keefe

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